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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. ANTONIO DE LEON-ORTIZ, aka Alex Sampson, Defendant - Appellant.	No. 06-10002 D.C. No. CR-04-00709-SMM MEMORANDUM*

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. ANTONIO DE LEON-ORTIZ, Defendant - Appellant.	No. 06-10092 D.C. No. CR-98-00836-SMM

Appeal from the United States District Court
for the District of Arizona
Stephen M. McNamee, District Judge, Presiding

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Submission Deferred April 12, 2007
Resubmitted April 14, 2008[**]
San Francisco, California

Before: HALL, O'SCANNLAIN, and IKUTA, Circuit Judges.

Antonio De Leon-Ortiz ("De Leon") appeals his conviction and sentence imposed for illegal reentry after deportation in violation of 8 U.S.C. § 1326. He also appeals the revocation of the supervised release he was serving as part of the sentence imposed for a prior § 1326 violation, and the sentence imposed for violating the terms of that supervised release. We affirm the conviction and the revocation, as well as De Leon's two sentences. Because the parties are familiar with the facts of the case, we do not recite them here.

1. Section 1326 Conviction

De Leon asserts that the district court erred in failing to grant his Rule 29 motion for a judgment of acquittal, based on insufficient proof of alienage and voluntariness. We reject this argument. De Leon admitted his alienage, and his admission was corroborated by his prior deportations. *See United States v. Sotelo*, 109 F.3d 1446, 1449 (9th Cir. 1997); *United States v. Contreras,* 63 F.3d 852, 858 (9th Cir. 1995). The jury could have inferred that his entry was voluntary because

[**] This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

he was found at a location other than the border and had reentered following a prior deportation. *See United States v. Quintana-Torres*, 235 F.3d 1197, 1200 (9th Cir. 2000); *United States v. Rivera-Sillas*, 417 F.3d 1014, 1021 (9th Cir. 2005).

De Leon also asserts that his conviction should be reversed because the district court failed to instruct the jury that De Leon's entry had to be voluntary. We agree that the district court erred but we find the error harmless. De Leon offered no evidence to rebut the government's showing that his reentry was voluntary. Because the record contains no "'evidence that could rationally lead to a contrary finding with respect to the omitted element,'" it is clear beyond a reasonable doubt that the jury would have found the defendant guilty absent the error. *See United States v. Salazar-Gonzalez*, 458 F.3d 851, 858-59 (9th Cir. 2006) (quoting *Neder v. United States*, 527 U.S. 1, 19 (1999)). We therefore affirm his conviction.

De Leon next argues that his 96-month sentence for his illegal reentry conviction is unreasonable. We disagree. The record reveals that the district court correctly calculated the Guidelines range of 84 to 105 months, and, after considering De Leon's arguments and the 18 U.S.C. § 3553(a) factors, found that a sentence in the middle of that range was warranted. *See Gall v. United States*, 128 S. Ct. 586, 596-97 (2007) (district court should use Guidelines as starting point,

listen to arguments from both sides, then consider the § 3553(a) factors to determine the proper sentence). The resulting within-Guidelines sentence was reasonable in light of the totality of the circumstances and the deferential abuse of discretion standard. *United States v. Carty*, Nos. 05-10200,05-30120, 2008 WL 763770, at *7 (9th Cir. Mar. 24, 3008) (en banc); *id.* at *6 ("'[W]hen the judge's discretionary decision accords with the Commission's view of the appropriate application of § 3553(a) in the mine run of cases, it is probable that the sentence is reasonable.'" (quoting *Rita v. United States*, 127 S. Ct. 2456, 2465 (2007)).

2. Revocation of Supervised Release

In a separate appeal, De Leon claims that the district court abused its discretion by revoking his supervised release, because the government offered insufficient proof of alienage and voluntariness. Because we affirm his 2005 conviction, we reject this argument. De Leon's 2005 conviction for violating 8 U.S.C. § 1326 shows by a preponderance of the evidence that he breached the terms of his supervised release for his prior Section 1326 conviction. *See United States v. Lomayaoma*, 86 F.3d 142, 146-47 (9th Cir. 1996). We therefore affirm the revocation of his supervised release.

Last, De Leon argues that the 13-month sentence he received for violating the terms of his supervised release was unreasonable. This argument fails as well.

The district court properly used the Guidelines as a starting point and considered the specifics of De Leon's case and the 18 U.S.C. § 3583(e) criteria in imposing the sentence.[1] *Gall*, 128 S. Ct. at 596-97. The resulting within-Guidelines sentence was not unreasonable. *Carty*, 2008 WL 767700, at *6-7.

Conviction AFFIRMED; sentence AFFIRMED.

[1] De Leon argues that the district court failed to properly consider the section 3553(a) factors, but in actuality, 18 U.S.C. § 3583(e) governs revocation sentences. Section 3583(e) incorporates most of the section 3553(a) factors.